Office-Supreme Court, U.S.
FILED
NOV 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2166

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLANT

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank
Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

58 pp

QUESTIONS PRESENTED*

1. May a state, consistent with the First Amendment, discipline a lawyer under its anti-solicitation rules for publishing a truthful newspaper advertisement informing women injured by an allegedly defective medical device that it may not be too late to bring suit, offering to represent them in such litigation, and agreeing to represent approximately 100 women who contacted him in response to the ad?

2. May a state, consistent with the First Amendment, discipline a lawyer for placing an advertisement which contains an accurate drawing of an allegedly defective medical device and which states that the lawyer is available to accept cases involving that device on a contingent fee basis, on the grounds that (a) the state considers any illustration other than a picture of a lawyer or a portrayal of the scales of justice to be inherently misleading, and (b) the state contends that, in every advertisement for contingent fee representation, a lawyer must state the specific percentages to be charged and describe the manner in which costs will be handled?

3. May a state, consistent with the Due Process Clause of the Fourteenth Amendment, discipline a lawyer on the ground that he placed a misleading advertisement, where the state (a) completely changes its theory of why the ad is misleading after the trial has been concluded, and (b) bases its finding that the ad was misleading on "general knowledge which can be determined from Municipal Court reports to the [Ohio] Supreme Court," where the reports were neither introduced into evidence nor previously mentioned in the proceedings?

---

* There are no parties to this proceeding other than those listed in the caption. The Ohio Newspaper Association, the Dispatch Printing Company, and the American Civil Liberties Union Foundation of Ohio, Inc. appeared as amicus curiae in support of appellant in the Supreme Court of Ohio.

CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES ..... (iv)

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 3

STATEMENT OF THE CASE 4

1. Statement of Facts 4
2. The Charges 6
3. The Evidence 10
4. The Board Decision 15
5. The Decision of the Supreme Court of Ohio 18

SUMMARY OF ARGUMENT 19

ARGUMENT 23

I. THE FIRST AMENDMENT PRECLUDES THE OHIO SUPREME COURT FROM DISCIPLINING APPELLANT FOR PUBLISHING HIS DALKON SHIELD AD. 23

Introduction 23

A. The Findings of Misconduct Based on the Anti-Solicitation Charges Violate the First Amendment 24

B. The Content-Based Findings of Misconduct Based On The Inclusion Of The Drawing Of The Dalkon Shield And The Failure To Include The Details Of Appellant's Contingent Fee Agreement Violate The First Amendment 33

1. The Dalkon Shield Illustration 33
2. The Affirmative Disclosure Requirements for Contingent Fees 37

II. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE CHANGED THE BASIS FOR OBJECTING TO HIS DRUNK DRIVING AD. 43

CONCLUSION 47

ADDENDUM

TABLE OF AUTHORITIES

Cases: Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ..... 4, *passim*

Bigelow v. Virginia, 421 U.S. 809 (1975) 23

Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875 (1983) 26, 28, 32

Bowman Transportation Inc. v. Arkansas - Best Freight System, Inc., 419 U.S. 281 (1974) 45

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 46

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) ..... 19, *passim*

Cole v. Arkansas, 333 U.S. 196 (1948) 22, 45

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 28

DeJonge v. Oregon, 299 U.S. 353 (1937) 45

Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980) 29

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 22, 35, 41

Page

Friedman v. Rogers, 440 U.S. 1 (1979) 40

Greene v. McElroy, 360 U.S. 474 (1959) 46

In re Primus, 436 U.S. 412 (1978) 24, 28

In re R.M.J., 455 U.S. 191 (1982) ..... 4, *passim*

In re Ruffalo, 390 U.S. 544 (1968) 22, 44-45

Linmark Associates Inc. v. Willingboro, 431 U.S. 85 (1977) 28

Matter of Discipline of Appert & Pyle, 315 N.W.2d 204 (Minn. 1981) 4, 15, 25, 29, 42

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981) 28

Morgan v. United States, 304 U.S. 1 (1938) 22, 45

NAACP v. Button, 371 U.S. 415 (1963) 25

Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio 301 U.S. 292 (1937) 46

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 18, 19, 23, 27, 28

Regan v. Time, Inc., 104 S. Ct. 3262 (1984) 33

Richardson v. Perales, 402 U.S. 389 (1971) 46

Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. 880 (E.D.Pa. 1984) 24

State v. Schaffer, 649 P.2d 355 (Okl. 1982) 30

Thompson v. Louisville, 362 U.S. 199 (1960) 46

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 31

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 20, 23, 29

Wolff v. McDonnell, 418 U.S. 539 (1974) 45

Zablocki v. Redhail, 434 U.S. 374 (1978) 41

Constitutional Provisions, Statutes, and Rules:

United States Constitution
First Amendment ..... 3, *passim*
Fourteenth Amendment ..... 3, *passim*

28 U.S.C. § 1257(2) 2
28 U.S.C. § 1257(3) 2
28 U.S.C. § 2403(b) 2

Rules, United States Supreme Court
Rule 28.4(c) 2

Rules of the Supreme Court of Ohio for the Government of the Ohio Bar
Disciplinary Rule 2-101(A) ..... 2, *passim*
Disciplinary Rule 2-101(B) ..... 3, *passim*
Disciplinary Rule 2-101(B)(15) ..... 8, *passim*
Disciplinary Rule 2-101(B)(16) 40
Disciplinary Rule 2-101(B)(17) 40
Disciplinary Rule 2-102(A)(6) 7
Disciplinary Rule 2-103(A) ..... 3, *passim*
Disciplinary Rule 2-104(A) ..... 3, *passim*
Disciplinary Rule 2-106(C) 6, 8, 15, 38, 43, 44

Practice Rule V 7, 18

Other Authorities:

Hazard, G., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084 (1983) 29

Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 4016 (1977) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-2166

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio issued on April 4, 1984, is set forth in Appendix A to the Jurisdictional Statement (App. 1a-7a) and is reported at 10 Ohio St. 3d 44, 10 OBR 308, and 461 N.E. 2d 883. The Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the "Board"), adopted on June 24, 1983, are set forth in Appendix B to the Jurisdictional Statement (App. 8a-21a) and are not officially reported.

JURISDICTION OF THIS COURT

This is an appeal from a final order disciplining a lawyer for placing two newspaper advertisements. The first two questions presented challenge the validity of three Rules for the Government of the Bar of Ohio, issued by the Supreme Court of Ohio. Appellant contends that, as applied to one of his two ads, the Rules are invalid under the First Amendment to the United States Constitution. The order of the Ohio Supreme Court imposing a public reprimand on appellant was entered on April 4, 1984 (App. C, 22a-23a) and a notice of appeal was filed on May 31, 1984, in the Supreme Court of Ohio (App. D, 24a-26a). Because 28 U.S.C. § 2403(b) may be applicable to this appeal, copies of appellant's notice of appeal and Jurisdictional Statement were served on the Attorney General of Ohio. *See* Rule 28.4(c) of the Rules of this Court. Jurisdiction in this Court is based on 28 U.S.C. § 1257(2).

The third question presented relates to the Supreme Court of Ohio's finding, also entered on April 4, 1984, that appellant's other ad violated Disciplinary Rule 2-101(A). Appellant alleges that this finding of misconduct violates the procedural due process protections of the Fourteenth Amendment. Because appellant does not challenge the validity of Rule 2-101(A), for that claim alone this Court would have only certiorari jurisdiction under 28 U.S.C. § 1257(3). However, because this Court has appellate jurisdiction under 28 U.S.C. § 1257(2) with respect to questions 1 and 2, it has appellate jurisdiction over the third question as well. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 4016 (1977) and cases cited therein.

This appeal was docketed in this Court on July 2, 1984, and on October 1, 1984, this Court noted probable jurisdiction.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States provides in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ....

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property without due process of law ....

The pertinent provisions of Rule V of the Rules for the Government of the Bar of Ohio, DR 2-101(A), DR 2-101(B), DR 2-103(A), and DR 2-104(A), are set forth in Appendix E to the Jurisdictional Statement (App. 27a-29a).

STATEMENT OF THE CASE

1. Statement of Facts

Appellant Philip Q. Zauderer has been a member of the Ohio Bar since 1964. His office is located in Columbus, Ohio, where he engages principally in plaintiffs' personal injury and product liability work. Prior to this proceeding he had never been the subject of a disciplinary proceeding.

This appeal challenges the public reprimand imposed on appellant for placing two different newspaper advertisements. Because the principal focus of the disciplinary proceeding was on the ad which was placed second in time, and because the charges relating to the other ad apparently would not have been brought but for appellant's second ad, we will first discuss the second ad, which is the subject of questions 1 and 2.

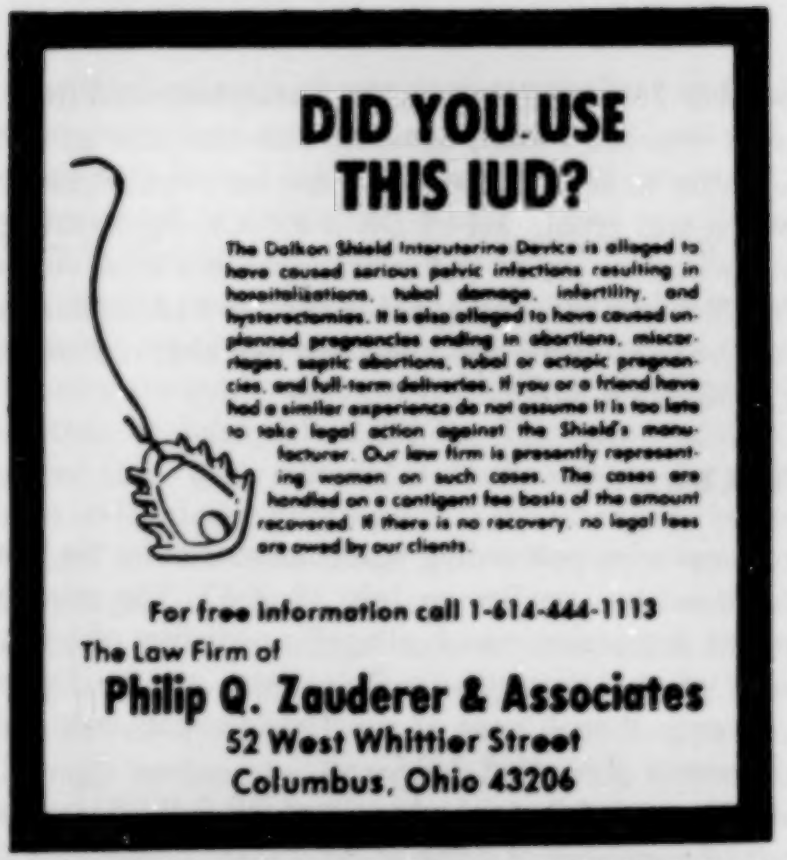
Beginning in May, 1981, appellant wrote to and met with members of the staff of the appellee Office of Disciplinary Counsel of the Supreme Court of Ohio, which is designated by that Court to enforce the attorney disciplinary rules in Rule V of the Rules for the Government of the Ohio Bar. That

Rule has been reproduced as an Appendix to Appellee's "Brief in Opposition to Appellate Jurisdiction, or in the Alternative to Petition for Certiorari" ("Opp. ____"). Appellant was interested in placing an ad similar to one which attorneys in Minnesota had run, which advised women who had suffered injuries from using the Dalkon Shield as a birth control device that it may not be too late to bring an action against the manufacturer of the device to recover damages for those injuries. The Minnesota ad contained a drawing of the Dalkon Shield, stated that the law firm was representing a number of women on a contingent fee basis, and gave telephone numbers and the address of the firm (J.A. 13). Eventually, counsel for appellee advised appellant that his ad would not comply with Disciplinary Rule 2-101(B), and he did not run the ad.

Two events rekindled appellant's interest in running the Dalkon Shield ad. On December 17, 1981, the Minnesota Supreme Court in *Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204, ruled that the Dalkon Shield brochures and letters issued by those lawyers were protected by the First Amendment, and on January 25, 1982, this Court issued its opinion in *In re R.M.J.,* 455 U.S. 191, which clarified the protections previously given to lawyer advertising under the First Amendment in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

Appellant then met with a member of appellee's staff to discuss his proposed advertisement in light of these decisions. The meeting was inconclusive, in part because appellee is not authorized to issue advisory opinions, and in part because there were items in appellant's proposed ad that were not specifically covered in *R.M.J.*.

However, because appellant believed that the Constitution permitted him to do so, and because he believed that he at least had the implicit approval of appellee, he decided to run the ad which appears at the top of page 5 and which is virtually identical to the proposed ad that he had discussed with appellee's staff. Between March 10, 1982, and May 22, 1982, this ad ran in 36 Ohio newspapers with a combined circulation of 1,860,160 (J.A. 16-17, ¶'s 29, 32; J.A. 21). As a result, approximately 235



DID YOU USE THIS IUD?

The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates

52 West Whittier Street

Columbus, Ohio 43206

individuals contacted appellant, and ultimately he filed lawsuits on behalf of 95 individuals, on a contingent fee basis, seeking damages for injuries sustained as a result of their use of the Dalkon Shield (J.A. 42, ¶'s 42-43).

The earlier advertisement run by appellant appeared for two days only, on November 25 and 26, 1981, in *The Columbus Citizen-Journal* (J.A. 9, ¶3). It provides as follows:

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

BEST AVAILABLE COPY

On November 26, appellant received a telephone call from a member of appellee's staff, advising him that this ad contained an offer to accept a criminal case on a contingent fee basis, which was prohibited by DR 2-106(C). Appellant immediately withdrew the ad and wrote appellee a letter confirming that fact and advising appellee that he had declined to represent two individuals who contacted him after reading the ad (J.A. 9-10, ¶'s 4-5).

2. The Charges

This disciplinary proceeding was commenced by the filing of a complaint by appellee on July 29, 1982. The principal focus of the complaint, which alleged a violation of various provisions of the Disciplinary Rules, was on the Dalkon Shield ad, even though none of appellant's clients ever complained about it (J.A. 41, ¶ 38).[1]

Count IV asserted that the ad violated DR 2-101(B) because it contained a number of items of information, including the description of a particular legal problem, which were not expressly authorized by the exclusive "laundry list" of matters which may be advertised under that Rule (J.A. 4). The same Count alleged that the ad also violated DR 2-101(A), which prohibits false and misleading advertising, but no specifics were cited to support that charge. However, neither the Board nor the Ohio Court found appellant guilty under either aspect of this Count. In Count V, appellee alleged that, because the ad contained a drawing of a Dalkon Shield, it violated DR 2-101(B), which prohibits the use of any illustrations in a legal services ad other than a picture of the lawyer or a portrayal of the scales of justice. Since appellant admittedly violated this Rule, the focus of the proceeding was on the constitutionality of the illustration ban.

[1]Counts I and VII will not be described because they did not allege any independent substantive violations.

The third separate charge against appellant on his Dalkon Shield advertisement was contained in Count VI. Ohio Disciplinary Rule 2-101(B) requires that advertisements must be "presented in a dignified manner," and appellee charged (J.A. 5, ¶ 19) that "the inclusion of a drawing or illustration or other representation of an I.U.D. . . . and the inclusion of comments which are directed at exciting action rather than informing the public does not constitute a 'dignified manner'" and thus violates DR 2-101(B). The same sentence also charged that "such material is detrimental to the public and serves no legitimate purpose which should or need be approved for legal service advertising . . . ." Not only was such conduct alleged to violate the specific rules governing advertisements, but it was alleged to have violated DR 2-102(A)(6), which prohibits a lawyer from engaging in "any other conduct that adversely reflects on his fitness to practice law." Although neither the Board nor the Ohio Supreme Court found a violation based on the specifics of this charge (or even discussed the allegation and its constitutional ramifications), it cannot be overlooked because it captures, far more than the specifics of the charges on which appellant was found guilty, the essence of appellant's offense as viewed by appellee, the Board, and the Ohio Supreme Court. *See also* Count IV, ¶ 10 (ad contains language which "is not *necessary* to advise the public of information which is needed to enable a consumer to properly identify or evaluate, a legal need . . . ")(J.A. 4, emphasis added).

Although more than eight months had passed since appellant had run the "drunk driving" ad, during which appellee never contacted appellant about the ad, he was also charged with violations based on it in Counts II and III.[2] The theory

[2]Under Rule V, Section 4 of the Ohio Supreme Court's Rules for the Government of the Ohio Bar, complaints are to be investigated within 60 days and dispositions made within 30 days thereafter (Opp., A-7; *also quoted* at J.A. 34, ¶ 47). The failure to comply with these time limits, especially for so simple a case as the drunk driving ad, further demonstrates that Counts II and III would not have been filed but for the charges made against the Dalkon Shield ad.

underlying both Counts was that appellant's offer of a full refund if the client were convicted of drunk driving was an offer to handle a criminal case on a contingent fee basis, which is specifically forbidden by DR 2-106(C). Thus, appellee alleged in Count II that appellant violated DR 2-101(B)(15) because the Rule forbids ads for contingent fees in criminal cases. And in Count III appellee charged that, since DR 2-106(C) forbids contingent fees in criminal cases, appellant's ad could not be fulfilled, and hence was false, fraudulent, misleading, and deceptive in violation of DR 2-101(A) (J.A. 3-4, ¶'s 3-7).

The parties entered into a detailed stipulation of facts on September 13, 1982 (J.A. 9-20). On the same day appellant filed a motion to dismiss, contending that the publication of the Dalkon Shield ad could not be prohibited consistent with the First Amendment. As to the drunk driving ad, he argued that, since it was not an offer to handle a case on a contingent fee basis, it was not subject to the disclosure requirements of DR 2-101(B) (15), and, for the same reason, did not violate the prohibition against contingent fees in criminal cases in DR 2-106(C). That motion was denied, and on December 17, 1982, appellee filed an amended complaint.

The principal purpose of the amended complaint was to add two new counts based on the Dalkon Shield ad. Count VIII (J.A. 25, ¶'s 24-27) focused on the fact that the ad stated that the representation would be on a contingent fee basis, but failed to contain any statement as to how such fees were to be computed. According to appellee, DR 2-101(B)(15) requires that all advertisements regarding contingent fees must disclose whether contingent fee percentages are computed before or after deduction of court costs and expenses. Since appellant did not include that information (indeed, he included no rate information at all, but simply stated that his representation would be on a contingent fee basis), he was alleged to have violated that Rule.[3] Appellee also charged that

[3]Presumably because the drunk driving ad stated that a full refund of legal fees would be paid if there were a conviction, and because it specified that expert witness fees must be paid in all cases, it met these affirmative disclosure requirements.

failing to include the information regarding the computation of the contingent fee was "likely to mislead the public" and hence was deceptive in violation of DR 2-101(A).

Whereas the portion of the original complaint covering the Dalkon Shield ad (Counts IV-VI) had focused on the content of the ad, the new charges in Count IX alleged that the placing of the ad, and the acceptance of employment from it, were not merely advertisements, but were improper acts of solicitation, and therefore violated the anti-solicitation Rules, DR 2-103(A) and DR 2-104(A) (J.A. 25-26, ¶'s 28-35). The first of these prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer (App. 28a-29a). According to appellee, appellant violated that provision because his ad recommended his own employment. The other provision, DR 2-104(A), prohibits an attorney from accepting employment (which appellant admittedly did) after giving "unsolicited advice" to an individual to "obtain counsel or take legal action" (App. 29a). Although the amended complaint does not specify the portion of the ad which violated this Rule (J.A. 25, ¶ 29), presumably the statement that the reader should not "assume it is too late to take legal action against the Shield's manufacturer" constituted the unsolicited legal advice or the recommendation to seek a lawyer's services. The complaint is clear, however, that, once appellant agreed to represent clients who responded to the ad, he had violated DR 2-104(A) (J.A. 26, ¶'s 31, 32, 34 & 35).

Appellant answered the amended complaint on January 14, 1983, and once again he raised the First Amendment, as well as numerous other defenses, to each of the charges involving the Dalkon Shield ad (J.A. 27-39). Paragraph 46 of his answer quoted paragraph 30 of the stipulation of September 13, 1982, which tracked precisely the language of DR 2-101(A) (App. 27a) and in which the parties agreed that:

> The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim (J.A. 34).

The parties entered into another stipulation of facts on May 24, 1983, and on that date a hearing was held before a three-member Panel of the Ohio Board of Commissioners of Grievances and Discipline (the "Panel").

3. The Evidence

At the hearing appellee offered in evidence three stipulations, copies of the two advertisements, and appellant's letter concerning the drunk driving ad. Appellant was also called to testify, principally regarding the Dalkon Shield ad. Appellee offered no evidence in support of the constitutionality of the Rules, and indeed argued that appellant should not be permitted to offer evidence on the constitutional issues either (T. 41, 51-52).[4] As a result of appellee's objections, the Panel did not formally admit much of appellant's testimony and most of his exhibits into evidence, but simply treated them as proffers (*see, e.g.*, T. 52, 67).

Despite appellee's objections, appellant offered substantial evidence on the constitutional question which focused on three basic propositions: (a) that there are substantial benefits to the public which flowed from the placing of his ad; (b) that illustrations are a highly useful means of communication and were particularly appropriate here; and (c) that there are potential benefits from increased lawyer advertising that are being thwarted, without justification, by the present Ohio Rules on advertising.

To demonstrate the first proposition, appellant introduced the testimony of two women who had developed serious

[4]References to the transcript of the hearing before the Panel are all to the original hearing record and will be cited as "T_____."

medical problems as a result of using Dalkon Shields, and who had contacted appellant and subsequently employed him after responding to his ad. Beverly Carr, age 37, testified that she first saw the ad in March 1982 and recognized the Dalkon Shield illustration in it as the birth control device that she had used (T. 175-76). As a result of wearing the Dalkon Shield, Mrs. Carr has become sterile, her reproductive system has been scarred, and half of it has been removed (T. 179). She further testified that she first learned about her legal rights when she called appellant, and that unless she had seen this ad or one similar to it, she probably would not have learned of those rights nor filed a lawsuit (T. 180).

Kaye Carver, a 30 year old secretary, testified that she saw the Dalkon Shield ad in the Sunday *Columbus Dispatch* in the spring of 1982, and recognized it as the device she had used for birth control a few years earlier (T. 186-87). She told the Panel that she had become pregnant while using the Dalkon Shield and had a child. However, she became pregnant a second time while still using the Dalkon Shield, and had a septic abortion (a miscarriage caused by an infection in the uterus) that her doctor told her could have been caused by the Dalkon Shield (T. 188-89). She also testified that she had previously talked to a lawyer about representing her, but the lawyer had told her that because too much time had passed since her injury, she could not sue the manufacturer (T. 189-90). It was only after reading appellant's ad and talking with him that she learned that the statute of limitations might not have run (T. 190).

In addition to this testimony concerning the value of the ad in enabling women to learn of their legal rights, appellant's expert, Dr. Robert L. Hallet, a medical school professor and obstetrician with more than 34 years of experience, explained the medical benefits derived from the ad.[5] Dr. Hallet testified

[5]Dr. Hallet did not appear at the hearing but was deposed prior to it. His deposition was not read at the hearing, but was attached to the trial record (T. 173-74). References to it will be "Dep.____." Counsel for appellee chose not to attend Dr. Hallet's deposition (Dep.5), nor did counsel attend the deposition of another of ap-

that a number of women were still using Dalkon Shields (Dep. 6-7) and that they should be removed (Dep. 11), because they are ineffective birth control devices and because they are potentially very dangerous (Dep. 7-8). In his view the advertisement served as a reminder to those women who knew that the product should not be used, which might prompt them to seek medical advice (Dep. 9-10). In his view, the ad might well have saved lives by causing women who were unaware of the dangers posed by the Shield to see a doctor (Dep. 11).

The second aspect of appellant's evidence was directed toward proving the benefits of the appellant's illustration, which Dr. Hallet referred to as a "very good portrayal" of the Dalkon Shield (Dep. 9). Dr. Paul V. Peterson, a professor of journalism and communications at Ohio State University, whom appellee agreed was qualified as an expert on the use of graphics (T. 48-49), testified about the importance of illustrations in general and of the Dalkon Shield illustration in particular. According to Dr. Peterson, illustrations are important in calling attention to a particular group of words, by enhancing the communication, by duplicating the message contained in the words, and by creating a vision to which people will respond in receiving the message (T. 53). In his view, advertisements are much less effective without illustrations (T. 54-55, 58, 60-61). He described the Dalkon Shield drawing as a "valuable part of this communication" (T. 54) in terms of capturing the attention of the reader.

Dr. Peterson also discussed and commented favorably on several ads of the Ohio State Bar Association that contained illustrations which, he believed, enhanced their ability to catch the attention of the reader (T. 63). By way of contrast, Dr. Peterson pointed out that the inclusion of a portrayal of the scales of justice or a picture of appellant in the Dalkon Shield ad would not have been effective since they have no relevance to the message which the ad is seeking to convey (T. 58-60).

---

pellant's expert witnesses, whose testimony was video-taped and played for the Panel (T. 141-43).

Also testifying on behalf of appellant was John Burpee, a vice president and accounts supervisor of the advertising agency which had developed the ads for the Ohio State Bar Association (Exs. 4-10, J.A. 45-51, T. 71-73). In Mr. Burpee's view, the illustrations contained in those ads helped attract the attention of the reader and helped to tell the story, which explains why "almost all the printed advertising contains some sort of illustration" (T. 74). The so-called "Uncle Harry" ad (Ex. 10, J.A. 51) used a photograph to capture the reader's attention and was so effective that it received an award from the Midwest Region of the American Federation of Advertising (T. 75). Supporting the prior testimony of Dr. Peterson, Mr. Burpee underscored the proposition that an illustration's initial mission is to gain the reader's attention and that time and again they have been proven effective for that purpose (T. 76).

Finally, appellant offered evidence to demonstrate the importance of lawyer advertising in general and the absence of any empirical basis for Ohio's restrictions, His first witness was Lori B. Andrews, a research attorney for the American Bar Foundation, who has also worked on the ABA's Commission on Advertising and its Commission on Public Understanding About the Law. Ms. Andrews is also the author of several articles and the book BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (T. 95-97). Based upon her research and experiences, she testified that lawyer advertising helps individuals identify their legal problems and assists them in finding a suitable lawyer (T. 106). She also discussed the recommendations of the ABA Commission on Advertising and of the Kutak Commission, which both advocated the elimination of most restrictions on truthful lawyer advertising (T. 107-109).

With regard to specific benefits from increased advertising, Ms. Andrews noted an Arizona study which indicated that increased advertising produced lower prices (T. 116, 120-21). She further observed that there was no evidence of reduced quality of legal work in jurisdictions that did not use the so-

called "laundry list" that Ohio had adopted (T. 110), nor is there any evidence of problems created by the use of illustrations (T. 123).

Appellant's final expert witness, Frank J. Benasutti, has been active for 15 years in lawyer ethics matters in Pennsylvania where he was, at the time of his testimony, chairman of the Commission of the Pennsylvania Bar Association whose duty it was to analyze the new ABA rules and to make recommendations (T. 142-45). The Commission, which is broadly representative of lawyers, judges, and members of the public, held hearings across the state regarding lawyer advertising as well as other matters (T. 146-47). Based on his experience, Mr. Benasutti believes that the laundry list approach taken by Ohio is not necessary for the protection of the public (T. 157) and that all advertisements should be permitted so long as they are truthful (T. 159). His study also led him to conclude that there are no special problems inherent in illustrations, that the public benefits from them, and that there is no evidence supporting the ban on illustrations contained in the Ohio Code of Professional Responsibility (T. 160-61, 166-67).

Appellant also took the stand on his own behalf, describing how he first became involved in Dalkon Shield litigation. When a woman first came to him with a possible Dalkon Shield lawsuit, he spent several weeks reviewing background materials on the device before agreeing to take the case (T. 194). That lawsuit led to a newspaper article that caught the attention of another woman, who also retained appellant (T. 195). These cases alerted appellant that there was a statute of limitations problem, particularly since it was uncertain whether Ohio would adopt a "discovery" rule for tolling the statute, as it eventually did (*id.*). He was also concerned because of the serious injuries that he had learned resulted from Dalkon Shields, such as infertility and life-threatening infections (*id.*).

He then testified about his efforts to advertise for clients who had been injured by a Dalkon Shield. First, he had run an

ad without a drawing, and with no specific mention of the Dalkon Shield, but that ad produced no response (T. 196). He then described the consideration he gave to placing an ad similar to the one that had run in Minnesota prior to the rulings of the Minnesota Supreme Court in *Appert & Pyle* and of this Court in *R.M.J.* (T. 195-97). He also recounted his meeting thereafter with counsel for the appellee, during which he received the mistaken impression that no action would be brought against him even though his ad constituted a technical violation of DR 2-101(B) (T.196-98). As he expressed it, "I felt in my own heart and in my own mind it was constitutionally protected" (T. 198), and he said that he would not have run the ad if he had not believed that he had the implicit consent of Disciplinary Counsel (T. 223). At the very least, this evidence demonstrated that the Dalkon Shield ad was placed in good faith, without any intention to violate the Rules.[6]

At the end of the hearing, the parties made concluding arguments, and thereafter on June 13, 1983, they submitted post-trial briefs. On June 24, the Panel issued its decision, which was adopted that day by the entire Board except for the recommended punishment.

4. The Board Decision

The Board, which is composed of seventeen members of the Ohio Bar who are appointed by the Ohio Supreme Court, first addressed the drunk driving ad. Appellee had based its case in Counts II and III on the proposition that the ad was an offer to handle a criminal case on a contingent fee basis, which is forbidden by DR 2-106(C). However, the Board found no violation based on this provision, since appellant had merely placed an ad, and had not entered a contingent fee

---

[6]Appellant also offered the testimony of Court of Common Pleas Judge George Twyford who had known him for almost 20 years. Judge Twyford testified that "if I needed a lawyer myself for a personal injury case, I would hire Mr. Zauderer" (T. 134). *See also* T. 135 ("I cannot even concede [sic] of his fitness being brought into question.")

agreement in a criminal case (App. 12a). The Board nonetheless found a violation, based on the prohibition against misleading advertisements in DR 2-101(A) because:

> It is general knowledge which can be determined from Municipal Court reports to the Supreme Court that, in disposing of driving while intoxicated (OM-VI) charges, in many cases, the charge is reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court. In that manner, the defendant would not be "convicted of drunken driving," and the legal fee would not be refundable. (App. 11a).

There was, however, no evidence in the record to support such a finding. In addition, the Board's theory of liability had never been urged by appellee, and thus appellant had no opportunity to offer evidence or present other defenses to it. Accordingly, in his August 24, 1983 brief to the Supreme Court of Ohio (pp. 76-82), appellant specifically argued that these departures from the charges brought by appellee constituted a violation of the Due Process Clause of the Fourteenth Amendment.

The Board also ruled that appellant's Dalkon Shield ad violated the Disciplinary Rules. First, it found that appellant had violated DR 2-103(A) (which it erroneously referred to as DR 2-102(A)), because the ad "implicity [sic] recommended that readers of the advertisement employ him or an associate before any reader sought his advice regarding employment of a lawyer" (App. 13a), a charge which, if sustained, would apply to virtually every ad that any lawyer had ever placed.

As to the charge alleging insufficient disclosures of appellant's contingent fee arrangement, the Board sustained the charge on two separate grounds, one of which had not previously been asserted by appellee. It agreed with appellee that a lawyer who mentions contingent fees in an ad must include all of the information in DR 2-101(B)(15) and that appellant had not done so (App. 14a). The Board also found that the ad was misleading, and hence violated DR 2-101(A), since it failed to disclose that the client would be liable for costs and expenses even if she did not prevail, and thus allegedly left the impression that the client would owe nothing. *Id.* Like the drunken driving finding, this charge had never previously been made, and appellant had no opportunity to defend himself against it.[7]

The Board next found that the inclusion of the Dalkon Shield drawing violated DR 2-101(B) and then offered a number of reasons why the prohibition against the use of nearly all illustrations was appropriate. The principal basis for the Board's conclusion was that:

> evidence and general knowledge with respect to newspaper, magazine, and television advertising make it clear that the use of illustrations can be the cause of misunderstanding, misleading interpretation of an advertisement, distraction from reading or understanding the significant messages of the verbal portion of an advertisement and in general, color the reaction of the viewer to the advertisement (App. 14a-15a).

The Board found it to be "not unreasonable" to prohibit appellant's illustration, while allowing a lawyer to include a picture of himself or a portrayal of the scales of justice (App. 15a).

Finally, the Board agreed with appellee that the statement that it was "not . . . too late to take legal action against the

---

[7]Unlike the other alleged violations regarding the Dalkon Shield ad, the failure to include specific fee rates and to state the client's obligation to pay costs could readily have been cured, with no adverse effect on the overall thrust of the ad, if appellee had indicated that there was a problem. So far as the record discloses, appellee's staff never raised the issue of contingent fee disclosures at the March 1982 meeting or at any other time. Indeed, these allegations were first made in December 1982 when appellee filed its amended complaint and included them in Count VIII (J.A. 25).

Shield's manufacturer," coupled with appellant's subsequent representation of those who responded to the ad and requested his services, violated the prohibition in DR 2-104(A) against offering legal advice and accepting employment based on it (App. 15a).

The Board next turned to the constitutional considerations, principally by reciting the holdings in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *In re R.M.J.,* 455 U.S. 191 (1982), and *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), and quoting extensively from *Ohralik* in upholding the application of the Rules to these ads (App. 15a-18a). However, it made no mention in its discussion of the evidence that appellant offered in support of his First Amendment defense. The Board then stated its conclusions and gave its recommendation. Although the Panel had recommended a public reprimand, the Board, while adopting all of the Panel's findings and conclusions, recommended that appellant be indefinitely suspended from the practice of law (App. 20a).[8]

5. The Decision of the Supreme Court of Ohio

The Supreme Court of Ohio affirmed each finding of a violation by the Panel and the Board. Its brief opinion contained very little discussion of appellant's claims that the Board has not properly interpreted the Disciplinary Rules, and it made no mention of the due process claims that appellant had raised. It briefly touched on the First Amendment issues, discussing only the *Bates* and *R.M.J.* decisions. It correctly noted that neither case entirely precluded states from regulating lawyer advertising, but then stated that the Rules involved here met the requirements of advancing a substantial state interest and were narrowly drawn (App. 6a-7a). It then announced its conclusion that all of the Rules which had been

[8]Under Ohio law, the minimum punishment for a violation of a Disciplinary Rule is a public reprimand, with the next most serious punishment a one-year suspension. Rule V, ¶ 6 (Opp. A-11). For a second offense, a lawyer must be indefinitely suspended or permanently disbarred, depending on the seriousness of the misconduct. Rule V, ¶ 7 *(id.)*.

called into question were reasonable and could constitutionally be applied to the Dalkon Shield ad. The Court recognized that appellant had introduced "a substantial amount of evidence . . . respecting the value of advertising to the public, and the unique value of respondent's Dalkon Shield advertisement in light of the public's limited awareness of the danger of that particular device . . ." (App. 2a-3a). However, it made no effort to weigh, as part of its First Amendment analysis, the benefits derived from the ad, including the fact that, because of it, nearly 100 women found a lawyer who agreed to represent them on a contingent fee basis and countless others learned of the connection between the Dalkon Shield and the injuries that they had suffered or might suffer in the future if the Shield were not removed.

The Court did not, however, adopt the punishment recommended by the Board, but instead imposed a public reprimand, as the Panel had suggested (App. 7a). The Court also imposed costs of $1,043.63 against appellant (App. 23a), and on May 23, 1984, it denied his motion to stay execution of its judgment pending appeal to this Court.

SUMMARY OF ARGUMENT

1. The fundamental flaw in the Ohio's First Amendment analysis of appellant's Dalkon Shield ad was in equating his ad with in-person solicitation. As this Court made clear in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), personal solicitation by a lawyer of a recent accident victim, who was still in the hospital, can properly be condemned only because it is likely to give rise to the kind of overreaching and undue influence that the state may legitimately forbid. Since the ad here, like that in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), was placed in a newspaper, the finding of misconduct can be sustained, if at all, only on some other proper rationale, and then only if the Rules forbidding such ads directly advance the governmental interest, by means no more restrictive than are necessary. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566 (1980).

Rather than offering specific justifications for the ban on appellant's Dalkon Shield ad, or introducing the evidence necessary to meet the other elements of the *Central Hudson* test, appellee has sought refuge in broad statements about the importance of regulating the legal profession and preventing misleading advertising. These generalizations are either insufficient to carry the state's burden, or are wholly irrelevant since appellee has stipulated that appellant's Dalkon Shield ad is not false or misleading (J.A. 17, ¶ 30).

Equally important, the Ohio Supreme Court wholly overlooked the substantial public benefits which may flow from advertising and which this Court recognized in *Bates, supra,* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). As appellant's witnesses made clear, many women first learned of the dangers of the Dalkon Shield and of the possibility of bringing suit to seek redress for their injuries when they saw appellant's ad. Not only were women made aware of their legal rights, but the ad may have prompted those who were still wearing the Dalkon Shield to visit their physicians and have it removed, thereby averting the possibility of serious injury, septic abortions, and even death. Particularly in light of the absence of any substantial governmental interest in prohibiting this ad, Ohio's failure to consider these benefits in undertaking the First Amendment balancing is another basis for setting the reprimand aside.

2. Ohio's ban on illustrations, other than a picture of a lawyer or a portrayal of the scales of justice, is also invalid under the First Amendment. The state offered no substantial justification for punishing appellant for including an accurate drawing of a Dalkon Shield in his ad, other than speculation that some ads which include illustrations may be misunderstood, hardly the kind of precise regulation required to overcome a First Amendment challenge. On the other side of the balance, the fact that a number of women would not have read appellant's ad without the Dalkon Shield drawing, and would thus have been denied the benefits of his messages,

surely outweighs the speculative interest asserted by the state to justify its ban on virtually all drawings.

Compounding the difficulty for the state is that DR 2-101(B), which prohibits appellant's drawing, nonetheless allows a lawyer to include a picture of himself or a portrayal of the scales of justice. The unrebutted testimony of appellant's experts made clear that the initial purpose of all illustrations is to catch the reader's attention. Consequently, Ohio's content-based choice permitting some illustrations but not others is subject to searching review under the First Amendment. Indeed, the evidence makes it clear that the illustration of the Dalkon Shield would be far more valuable than a picture of a lawyer or of the scales of justice, if such comparisons are at all relevant.

3. The final charge based on appellant's Dalkon Shield ad—that it said too little about his contingent fee arrangements—also violates the First Amendment. By requiring lawyers to include both the percentages they charge, and whether they are computed before or after expenses are paid, whenever contingent fees are mentioned in an ad, the Ohio Supreme Court has imposed burdensome affirmative disclosure requirements that lack any justification.

Apparently Ohio believes that potential clients may be misled by ads which do not set forth all of the required information on contingent fees, yet there is no evidence to suggest that such is the case. Moreover, the Ohio Supreme Court overlooked two points made in *Bates:* that ads are not the sole means by which clients obtain information before employing lawyers, and that some information is generally better than no information at all. *See* 433 U.S. at 374-75.

What Ohio seems to be saying is that clients have a right to know precisely what rates they will be charged and whether the charges will be computed before or after expenses are paid. We agree. But the Rule under which appellant was charged applies only to contingent fee cases, and no similar requirements are imposed for ads involving hourly rates or fixed fees, where similar problems of nondisclosure exist.

Even more important is the fact that Ohio has no requirement that the actual fee agreement (in contingent fee or any other cases) include such information, whether the client approaches the lawyer as the result of an ad, through a friend, or simply walks in off the street. Indeed, under the Ohio Code of Professional Responsibility, fee agreements are not required to be in writing, and the Code has no provision for mandatory disclosure of any terms in fee agreements. Thus, to the extent that the affirmative disclosure requirements for contingent fees in DR 2-101(B)(15) serve any state interest, they are both under- and overinclusive, a failure found fatal by this Court in decisions such as *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 793 (1978).

4. The charges against appellant based on his drunk driving ad also cannot stand because they violate the Due Process Clause of the Fourteenth Amendment. After the case was tried and argued, the Board developed a new theory, wholly different from the one which appellee alleged in the complaint and attempted to prove at trial. In order to support its new theory, the Board simply took judicial notice of certain Municipal Court reports, but gave appellant no opportunity to offer any evidence in rebuttal. When this due process violation was pointed out to the Ohio Supreme Court, it simply ignored appellant's argument and upheld the Board despite the absence of notice and an opportunity to reply.

The law is clear, however, that in attorney disciplinary proceedings such as this, shifts in theory and reliance on new evidence in the manner done here violate due process. *In re Ruffalo,* 390 U.S. 544 (1968). That rule has been applied in a variety of criminal and administrative law contexts, *see, e.g., Cole v. Arkansas,* 333 U.S. 196 (1948), and *Morgan v. United States,* 304 U.S. 1, 18 (1938), and the Ohio Supreme Court committed error in not applying it to the Board's change in theories and its taking judicial notice of the only "evidence" supporting the misconduct finding on the drunk driving charges.

ARGUMENT

I. THE FIRST AMENDMENT PRECLUDES THE OHIO SUPREME COURT FROM DISCIPLINING APPELLANT FOR PUBLISHING HIS DALKON SHIELD ADVERTISEMENT.

Introduction

Beginning nearly ten years ago in *Bigelow v. Virginia,* 421 U.S. 809 (1975), and continuing the following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), and nearly every term since then, this Court has established the permissible limitations of state regulation of commercial speech under the First Amendment. In 1980, this Court set forth a four-part test for this analysis in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566 (*"Central Hudson"*). Under that test, to be protected by the First Amendment, commercial speech must "first concern lawfully activity and not be misleading." *Id.* Next, the court must ask "whether the asserted government interest is substantial" and then "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

Within the general category of commercial speech, this Court has, on four occasions, examined the limits to which a state may go in restricting the ability of lawyers to attract business by both media advertising, *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977)(*"Bates"*), and *In re R.M.J.,* 455 U.S. 191 (1982) (*"R.M.J."*), and by more direct means, *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (*"Ohralik"*), and *In re Primus,* 436 U.S. 412 (1978) (*"Primus"*). And, although the sale of legal services differs in many respects from the sale of other goods and services, the *Central Hudson* analysis applies to lawyer advertising, while taking into account the special characteristics of the legal profession and its relation to the people it is licensed to serve. *R.M.J.,* 455 U.S. at 203. Thus, Ohio may regulate, but not prohibit lawyers from

truthfully publicizing the availability of their services, but it must do so within the confines of *Central Hudson's* requirements that any regulations directly advance a substantial interest in a manner no more restrictive than necessary.

In appellant's view, these cases provide the framework which clearly points the way toward reversal of the rulings by the Ohio Supreme Court on the Dalkon Shield ad for three separate, but related reasons. For most of these restrictions Ohio—*i.e.,* the appellee, the Board, and the Ohio Supreme Court—has not offered a substantial state interest of the kind required to defeat appellant's First Amendment challenge. Second, where justifications were offered, they were inadequate as a matter of law, as well as fact, to sustain the charges made against appellant's Dalkon Shield ad. And third, nowhere did the State take into account the very substantial benefits that accrued to the public as a result of appellant's ad.

There is one other preliminary point which should be noted. Although the Ohio Court treated appellant's First Amendment defense as a single issue, he was charged with three separate violations for the Dalkon Shield ad, each of which presents its own questions under the First Amendment, requiring separate consideration. *See Spencer v. Honorable Justices of the Supreme Court of Pennsylvania,* 579 F. Supp. 880 (E.D. Pa. 1984), where the court separately analyzed each of the plaintiff's objections in light of the specific interests served by disclosure of that item of information, balanced against the specific harm sought to be averted by the rule under challenge. Accordingly, we will now review each of the three charges in light of the justifications offered to sustain them under the First Amendment.

A. The Findings of Misconduct Based on the Anti-Solicitation Charges Violate the First Amendment.

The primary thrust of the solicitation charges against appellant is that he actively sought clients in violation of DR 2-103(A) and DR 2-104(A) by placing an advertisement in 36 Ohio newspapers directed at women who were injured by

Dalkon Shields, telling them that "it may not be too late" to sue the Shield's manufacturer for their injuries. By calling the conduct "solicitation" rather than "advertising," it may be that appellee and the Ohio Supreme Court hoped to avoid this Court's rulings in *Bates* and *R.M.J.,* upholding the rights of lawyers to advertise generally. However, it has long been established that "a state cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. 415, 429 (1963); *Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204, 211 (Minn. 1981) (*"Appert & Pyle"*) ("character of the mailing, be it solicitation or advertising, should not be treated as significant"). Since appellee has made no claim that the basic message of the advertisement (other than the matters relating to contingent fees) is in any way misleading or relates to an unlawful transaction, the finding of misconduct can be defended only if the remaining three aspects of the *Central Hudson* test are met.

Before considering the application of that test, a review of the specifics of these charges is necessary. The gravamen of the solicitation accusation under DR 2-104(A) is that appellant accepted employment after giving unsolicited advice (presumably legal advice although the Rule does not so specify).[9] That advice consisted of the statement that "it may not be too late" to sue for Dalkon Shield injuries because (although the ad did not say this in so many words) the statute of limitations had not run since the plaintiff (reader) had only recently discovered the connection between the injuries suffered and the Dalkon Shield. The ad also allegedly violated DR 2-103(A) because it contained a recommendation to employ appellant to handle Dalkon Shield litigation, a charge that could apply to any advertisement, and he accepted employment after making that recommendation, a violation

[9]The Ohio Supreme Court appears to have adopted this interpretation, as evidenced by its statement defending the constitutionality of the Panel's finding of misconduct that "it is *reasonable* for a state to impose restrictions upon lawyer advertising, prohibiting the lawyer from giving *legal advice* in a specific area and then recommending employment of himself to those who have not sought his advice" (App. 6a-7a, emphasis added). The Ohio Court's application of a standard of reasonableness in ruling on the First Amendment challenge was plainly in error.

that presumably could occur for any advertisement that produced clients. One other point is important in assessing the constitutionality of these charges: the inclusion of the drawing of the Dalkon Shield and the dispute about the disclosure of contingent fee rates and expenses are irrelevant since those matters were the basis of separate charges against appellant.

The first difficulty in sustaining these charges is in identifying "the substantial governmental interest" at stake in applying the prohibition to this case. *Central Hudson,* 447 U.S. at 566. Appellee offered no reasons to support the blanket ban on mass media communications of this type and indeed argued to the Panel that it was not required to do so (T. 41-42), even though this Court has made it clear that the party seeking to uphold a restriction on commercial speech has the burden of justifying it. *Bolger v. Youngs Drug Products Corp.,* 103 S. Ct. 2875, 2882 n.20 (1983). Nor did it heed this Court's warning in *Central Hudson* that the courts should "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566 n.9.

In its opposition in this Court, appellee argued that Ohio has a "substantial interest in regulating the legal profession," that it has similar interests in enforcing its disciplinary rules, and that it has a substantial interest in "promulgating disciplinary rules with which a large number of Ohio attorneys are in substantial agreement" (Opp. 6-7). In other places, it specifically referred to "the public interest of regulating the legal profession" and to the fact that lawyer advertising is intended "to attract clients," with lawyers having a "substantial pecuniary incentive" to do so. *Id.* at 8. And it made the unsupported assertion that due to its selective nature, "advertising by attorneys is not a reliable process for conveying accurate information to the public." *Id.* Plainly all of these interests were present in *Bates* and *R.M.J.,* yet provided an insufficient basis for the restrictions struck down there, and are thus inadequate here.

Not only did appellee fail to offer evidence before the

Panel to support the restrictions on the Dalkon Shield ad, but the Ohio Supreme Court also offered no justification in its brief discussion of the solicitation issue under the First Amendment. The Panel came the closest to identifying the state interest in prohibiting this truthful newspaper ad, which said no more than, "If you were injured by a Dalkon Shield, even if it happened several years ago, it may not be too late to sue, and our firm is willing to discuss representing you in litigation against the Shield's manufacturer." The Panel correctly recited the holding of *Ohralik,* which sustained the discipline imposed for what the Panel described as "in-person solicitation of legal representation while the anticipated client was confined to the hospital after having been injured in an automobile accident" (App. 16a). However, it then went on to find that the "in-person solicitation of employment by conference in Respondent's office, though voluntarily undertaken by the anticipated clients, is *not wholly different* from the *Ohralik* situation when the inequalities of the lawyer-client conference are considered" *(Id.,* emphasis added).

That was plain error. To equate the solicitation in *Ohralik* with the circumstances of reading a newspaper advertisement in the privacy of one's home is to overlook virtually the entire focus of the Court's opinion in *Ohralik.* The Court there upheld the discipline because it found that the conduct was "a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." 436 U.S. at 468; *see also id.* at 449 (state may discipline lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has the right to prevent"). This Court in *Ohralik* also enunciated the very distinction between in-person solicitation and advertising which the Ohio Court ignored: whereas advertising "simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457.

That contrast is reinforced by the Court's opinion in *Primus,* issued the same day as *Ohralik,* in which discipline based on anti-solicitation rules similar to those relied on by the Ohio Supreme Court here (*see* 436 U.S. at 418, 420, nn.10 & 11), was held to violate the First Amendment. In *Primus,* where the solicitation occurred through a letter written by the lawyer to the potential client, this Court observed that "the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct." *Id.* at 435-36; *see also id.* at 434, describing *Ohralik* as a solicitation "under cicumstances likely to result in adverse consequences." Moreover, as this Court has made clear, different methods of communication require different treatment, *see Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 501(1981), and thus, the court below erroneously equated media advertising and in-person solicitation because they are, contrary to what the Panel suggested, "wholly different" from each other.

As this Court has recognized on many occasions, someone who saw appellant's Dalkon Shield ad and who was not interested in reading it, could simply turn the page, an act requiring no more difficulty than "averting their eyes" or "transferring the [message] from envelope to wastebasket", practices which this Court found to obviate the state's objections in cases such as *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 542 (1980), and *Bolger v. Youngs Drug Products Corp., supra,* 103 S.Ct. at 2883. In short, this is not a case in which Ohio is seeking to prevent "the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference" which it may properly do. *See Primus,* 436 U.S. at 426. Despite the fact that this Court has made it clear that "commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental'," *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 n.6 (1977), the Ohio Supreme Court has done precisely that.

The failure of the State to articulate any substantial interest to support the ban on the Dalkon Shield ad makes it difficult, if not impossible, for it to show that the ban directly advances such an interest and does so in a way that is not unduly restrictive, as *Central Hudson* also requires. In addition, as this Court recognized in *Virginia Pharmacy Board* and *Bates,* a central component of the balancing process is the public's interest in receiving useful information that the state is suppressing. As one district court put it:

> *Bates* is not a decision for the benefit of the Bar; it is a decision for the benefit of consumers of legal services, and it is from their standpoint that the problem must be approached.

Durham v. Brock, 498 F. Supp. 213, 222 (M.D. Tenn. 1980); *see also, Bates,* 433 U.S. at 364 (discussing the benefits that flow from advertising); *Appert & Pyle,* 315 N.W.2d at 209 (interests at stake in allowing advertisement include those of lawyer and the public); *see generally,* G. Hazard, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services,* 58 N.Y.U. L. Rev. 1084 (1983).

There are a number of reasons why the benefits that would flow from allowing the Dalkon Shield ad more than outweigh any conceivable negative impact that permitting the ad might have. First, women who had used the Dalkon Shield learned a number of important facts, directly affecting them, solely as a result of the ad. They were informed that it was possible to sue the Shield's manufacturer for injuries which they sustained, that such suits might still be brought even if the injuries occurred several years before, that there was a lawyer who was already handling similar cases who would be willing to consider handling their case, and that he would do so on a contingent fee basis. As this Court has recognized, one of the principal dificulties in obtaining legal services is in finding a lawyer qualified to handle the consumer's particular problem, at a price the client can afford. *Bates,* 433 U.S. at 376; *see also* testimony of Lori Andrews (T. 106). Yet this ad, which Ohio has prohibited, provides precisely the assistance that potential clients need to overcome the information barrier.

Perhaps the clearest way to demonstrate the error of the Ohio Supreme Court is to revisit the portion of the ad in *Bates* advertising divorce services, modify it slightly, and view it through Ohio's analysis of DR 2-103(A) and DR 2-104(A). If that ad had said "the law in Arizona does not require married couples to stay married if either of them wishes a divorce," Ohio seems almost certain to have called that "unsolicited legal advice." And if the ad had also stated that "the law firm of Bates & O'Steen is available to do the necessary legal work for you, just as it's doing for hundreds of others each year," Ohio would probably have concluded that such a statement was an implicit "recommendation of employment." And if the Bates firm had accepted clients based on those statements, Ohio would surely have found the lawyers in violation of DR 2-104(A) and DR 2-103(A). While the actual ad in *Bates* is different in a number of respects (*see* 433 U.S. at 385), none of the differences is material for these purposes. Accordingly, *Bates* precludes the enforcement of these Rules in this situation, even if Ohio chooses to call the ad a solicitation.[10]

This is not a case in which the Court must speculate about the benefits that might flow from increased advertising, since the record amply demonstrates what the benefits are. At least 235 women responded to appellant's ad, and nearly 100 of them retained him to represent them in Dalkon Shield litigation. It is also clear from the testimony of appellant's two clients who appeared before the Panel that the ad was the direct link that enabled them to find an attorney and to bring a lawsuit to redress the serious injuries that they had suffered. Indeed, one of the women had previously seen a lawyer who had told her (incorrectly) that it was too late to sue (T. 190), and another testified that she was unaware of the connection

[10]Similarly, an ad embodying the "legal advice" that "if you don't have a will, the state will decide who gets your assets when you die," would seem functionally indistinguishable from the instant ad, but also indistinguishable from *Bates*, as would an advertisement announcing, "if you have been discriminated against in your job because of race, sex, religion or national origin, you may have a claim against your employer." *See State v. Schaffer*, 649 P.2d 355 (Okl. 1982) (upholding an ad involving "advice" regarding adoptions).

between her serious injuries and the Dalkon Shield until she saw appellant's ad (T. 179). While the Dalkon Shield manufacturer was undoubtedly displeased with the ad and the resulting litigation—its Ohio counsel contacted appellee about the ad (J.A. 41, ¶ 40)—this Court has made it clear in *Bates* that it "cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." 433 U.S. at 376.

Not only did hundreds of women learn of their legal rights and find a lawyer willing to sue to enforce them, but the ad, which was placed in the grocery section of newspapers "in an effort to provide information to as many women as possible" (J.A. 17, ¶ 31), also informed the reader that the Dalkon Shield is a potentially dangerous product. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (educational and fundraising functions of solicitation closely intertwined). As Dr. Hallet testified, a number of women are still wearing Dalkon Shields, and therefore publishing ads such as this may help to alert them of the need to have the Shield removed since it is both dangerous and ineffective (Dep. 7).

There is one other point which suggests that the provable benefits of this ad may significantly understate the increase in consumer awareness that it produced. Suing for injuries resulting from the Dalkon Shield, or even contacting a lawyer about the possibility of such litigation, is a very different matter from, for example, filing suit after slipping on the pavement in front of the supermarket. The injuries that were sustained from using the Dalkon Shield involve a woman's reproductive system, and any litigation would inevitably require discovery into how those most private parts of a women's body had been damaged. In addition, the Dalkon Shield was intended to be used as a birth control device, and thus the manufacturer would almost certainly seek to inquire into the sex lives of the plaintiffs to determine such matters as when the Shield was first used (*i.e.*, before marriage or after), whether the plaintiff had ever had venereal disease, as well as

other highly personal matters. Surely, no woman would lightly bring such a lawsuit unless she were convinced that she had been seriously injured, that the Dalkon shield had caused the injury, and that she had full confidence in her lawyer. Yet, it can hardly be doubted that, but for appellant's Dalkon Shield ad, nearly 100 women would never have embarked on such litigation.[11]

Since neither the Panel nor the Ohio Supreme Court cited *Central Hudson*, it is not surprising that neither undertook the balancing required by that decision, as well as by *Bates* and *R.M.J.*. But even if they had, it is plain that there is no substantial interest in suppressing the Dalkon Shield ad, and that there are substantial interests which were advanced when appellant ran the ad and accepted employment from clients who contacted him after reading it. Nonetheless, Ohio has publicly reprimanded appellant for doing what Ethical Consideration 2-1 of the Ohio Code of Professional Responsibility requires him to do—see that members of the public "recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain services of acceptable legal counsel." *See also Bates*, 433 U.S. at 377. Accordingly, for all these reasons, the First Amendment precludes Ohio from disciplining appellant for publishing the Dalkon Shield ad on the ground that such conduct constitutes improper solicitation of clients.[12]

---

[11]It also seems likely that appellee, if not the Ohio Supreme Court, was disturbed by the fact that appellant was advertising for cases involving injuries of this kind, as demonstrated by Count VI, which charged appellant with advertising in an undignified manner (J.A. 5, ¶ 19). However, this Court has held that states may not prohibit advertisements simply because they are offensive or embarrassing. *R.M.J.*, 455 U.S. at 205 ("bad taste" not a proper basis for banning an ad); *Bolger v. Youngs Drug Products Corp.*, *supra*, 103 S. Ct. at 2883 (allegedly "offensive" nature of mailing of contraceptive ads held insufficient basis to ban them).

[12]While the portion of the American Bar Association's new Model Rules of Professional Conduct on "Information About Legal Services" contains a number of restrictions, there is nothing comparable to DR 2-103(A) and DR 2-104(A) that would apply to appellant's Dalkon Shield ad. Rules 7.1-7.5, which cover this topic, and Rule 1.5(c), which deals with contingent fees, are reproduced in an Addendum to this brief ("Add." ____).

B. The Content-Based Findings Of Misconduct Based On The Inclusion Of The Drawing Of The Dalkon Shield And The Failure To Include The Details Of Appellant's Contingent Fee Agreement Violate The First Amendment.

1. The Dalkon Shield Illustration

Count V of the complaint charged that appellant's inclusion of an illustration of a Dalkon Shield in his advertisement violated DR 2-101(B), which prohibits "the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice." There is no dispute that the ad violated the Disciplinary Rule, nor is there any dispute that the illustration is, as Dr. Hallet described it, a "very good portrayal" of the Dalkon Shield (Dep. 9). Accordingly, the ban on illustrations can only be sustained if illustrations are shown to be "inherently misleading," *R.M.J.*, 455 U.S. at 207, or on the basis of some other substantial state interest. *See Regan v. Time, Inc.*, 104 S. Ct. 3262, 3271-72, 3294-96 (1984) (ban on illustrations of dollar bills of the same size and color as the original upheld in order to prevent counterfeiting).

Once again, the problem in defending this ban is that at no point did the Ohio Supreme Court, which issued the Rule and then upheld its constitutionality, ever identify the precise governmental interest being served. The Court merely stated something which surely applies to some ads—that a "potential client peering at a lawyer advertisement may be misled or confused by the expressed words, by an illustration or drawing, or by a combination of both" (App. 6a). But the possibility that *some* clients may be misled by *some* drawings cannot overcome a First Amendment challenge to a ban on *all* illustrations other than a picture of a lawyer or a portrayal of the scales of justice. Nor did the Panel's discussion of the constitutional question (App. 16a-19a) provide any

assistance, since it made no mention of the ban on illustrations in responding to appellant's First Amendment claim.[13]

In its opposition in this Court, appellee conceded that Ohio may not sustain its Rule on the ground that all illustrations are inherently misleading (Opp. 10). However, the same sentence went on to assert that "the state may rationally conclude that illustrations in attorney advertising are so inherently subject to abuse and manipulation through emotional or subconscious appeals as to be incapable of effective regulation through rational legal process." If that argument is not simply a restatement of the "inherently misleading" claim, it is difficult to understand what it means. Moreover, appellee offered no evidence to support that or any other ground for prohibiting the Dalkon Shield drawing, despite the clear dictates of *R.M.J.* that such proof is required in the face of a First Amendment challenge. *See* 455 U.S. at 202 ("the *record* indicates that a particular form or method of advertising has in fact been deceptive"), 205-06 ("[t]here is nothing in the *record* to indicate that the inclusion of this information was misleading"), 206 ("[b]ut again we deal with a silent *record*") ("[t]here is no indication in the *record* of a failed effort to proceed along such a less restrictive path") (emphasis added). Indeed, there is directly contrary testimony in this record on whether any harm might result from the use of illustrations in lawyer's ads: both of appellant's experts, who have studied the issue of lawyer advertising extensively, stated that there was no evidence of any such harms from illustrations and that, in fact, the public benefits from their inclusion in lawyers' advertisements (T. 110, 112, 160-61, 166-67).

A ban on all illustrations would be difficult enough to defend, but the exceptions in DR 2-101(B) for pictures of the lawyer or portrayals of the scales of justice make the Rule impossible to justify. As appellant's experts testified, all illustrations, including those permitted by Ohio, perform the

[13]The Panel did discuss illustrations earlier in its ruling, but did no more than state the same kind of truism as did the Ohio Supreme Court—"that the use of illustrations can be the cause of misunderstanding . . ." (App. 14a-15a).

primary function of attention-getting and the secondary functions of amplifying and clarifying the advertisement's message (T. 52-53, 74-76). *See also* App. 14a (Panel accepted the view that illustrations are principally attention-getters). Thus, any justification for the ban in DR 2-101(B) would also suggest a ban on the illustrations which Ohio allows lawyers to use. Accordingly, under cases such as *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 793 (1978), the Rule cannot stand because it is both underinclusive and overinclusive.

In its brief in opposition, appellee argued that scales of justice could be properly included because they are "generally accepted symbols of the rational balancing process of legal reasoning" (Opp. 10). How their inclusion in a printed advertisement benefits the consuming public is not explained, nor does that statement address the more relevant question, which is not why the scales of justice are allowed, but why all other accurate illustrations and photographs are prohibited. The same is true for appellee's attempted justification that a lawyer's picture, while not conveying much information, should be permitted because "people seeking public approval have the right to communicate to the public what they look like." *Id.*[14] These assertions simply underline what appellant's experts said at the hearing: all illustrations, including the two permitted ones, and including those in the ads of the Ohio State Bar Association (J.A. 45-51), are used to catch the reader's attention, and there is no rational basis for allowing some and not others, as long as they do not mislead the public.

Finally, if this Court were to find it necessary to compare the utility of having a drawing of the Dalkon Shield in appellant's ads, or his picture or the scales of justice, the record leaves little room for doubt that appellant's illustration is more valuable. First, it readily identified that it was a Dalkon Shield I.U.D. that caused the problem, rather than one of the

[14]Presumably, appellee is not arguing that Ohio should encourage clients to select their lawyers on the basis of their photographs, although that inference is certainly a permissible one based on this argument.

other I.U.D.'s on the market (J.A. 40-41, ¶ 37, T. 55). Second, one of appellant's clients testified that, but for the illustration, she would not have seen the ad and learned of her rights (T. 176-79). Dr. Hallet also testified that the illustration may have caused other women to recognize their need for medical attention if they were not previously aware of the problems caused by the Dalkon Shield (Dep. 9-11). Furthermore, appellant's other experts offered their opinions that advertisements are much less effective without drawings, since many people do not read the text and might not associate the term Dalkon Shield with the particular I.U.D. that they had used (T. 60-61, 84-85), a point confirmed by the failure of anyone to respond to appellant's previous Dalkon Shield ad which did not contain an illustration (T. 196). And as to the use of a picture of Mr. Zauderer or a drawing of the scales of justice, Dr. Peterson testified that they would have provided no help to the public since they are wholly irrelevant to the message appellant sought to convey (T. 58-60).[15]

Although the avowed purpose of DR 2-101(B) is to "further the process of an informed selection of a lawyer," its ban on illustrations produces precisely the opposite result. Based on both the record below and this Court's prior decisions, there can be little doubt that Ohio's ban on all drawings other than the scales of justice and a picture of the advertising lawyer does not meet the requirement that commercial speech must be regulated "with care and in a manner no more extensive than reasonably necessary to further substantial interests," *R.M.J.*, 455 U.S. at 207, and therefore cannot be upheld.

[15]The new Model Rules of Professional Conduct dealing with information about legal services (Rules 7.1 and 7.2) do not contain any prohibitions on the use of accurate illustrations or photographs (Add. 1-2).

2. The Affirmative Disclosure Requirements For Contingent Fees

The other two violations for which appellant was reprimanded are contained in Count VIII of the amended complaint and relate to certain nondisclosures regarding his contingent fee arangement. Appellant's ad merely stated that his representation in Dalkon Shield litigation would be on a contingent fee basis, but did not include either the percentages to be charged or whether those percentages would be computed before or after costs were paid. According to appellee, those omissions violated the specific requirements for inclusion of contingent fee rate information in DR 2-101(B)(15) and the prohibitions against misleading advertisements in DR 2-101(A).[16]

In assessing the constitutional validity of this ruling, four general points should be noted. Although appellee's amended complaint alleged that the failure to include the fee information was misleading, it had previously stipulated that:

[16]The Panel also found a violation of DR 2-101(A) on the ground that the advertisements stated that no legal fees would be owed if there was no recovery, which suggested that costs need not be paid either (App. 14a). Although the Ohio Supreme Court mentioned this violation in passing in its opinion (App. 3a, 5a), and appellee relied on it in its opposition in this Court (Opp. 9-10), there was no discussion of it in the body of the Ohio Court's opinion, and hence it is impossible to determine whether the Court upheld a finding of misconduct on this theory. As with the other charges, there was no evidence offered that clients would not be able to distinguish between legal fees and costs. More importantly, appellee never alleged that the failure to disclose that the obligation to pay costs was misleading. Count VIII, ¶ 27 of the amended complaint (J.A. 25) charged only that "the failure to include the qualification regarding *computation* of contingent fee is a violation of DR 2-101(B)(15) and a violation of DR 2-101(A) as a deceptive statement likely to mislead the public" (emphasis added). This allegation, coupled with the allegation in ¶ 26 that there was no statement "about the method for computing such fee as required by DR 2-101(B)(15)," makes it clear that appellant was charged under two different provisions for failure to include the information required by subpart 15. Because he was never charged with having made a misleading statement based upon the "no-legal fees" assertion being equivalent to a "no-cost assertion," it would be a violation of due process if he were found guilty of placing a misleading advertisement on that basis, for the reasons set forth in Point II, *infra*.

> The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim (J.A. 17, ¶30).

Second, the fact that the charge was not made in the original complaint suggests that if appellee found the ad misleading, it was only after several readings of both the ad and the Code that it reached this conclusion. Third, if there was a serious possibility that this advertisement was misleading, the problem should have been called to appellant's attention at either of his two meetings with appellee's staff when the problems could have been corrected. Finally, the interpretation of DR 2-101(B)(15) adopted by the Ohio Court comes perilously close to violating the notice requirements embodied in the Due Process Clause. As written, DR 2-101(B)(15) simply permits the publication of "[c]ontingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses," but gives no warning that it also imposes two affirmative disclosure requirements whenever contingent fees are mentioned. However, this Court need not decide the Due Process question since it is plain that the disclosure requirements here cannot meet the standards under the First Amendment.[17]

In its discussion of the First Amendment, the Ohio Supreme Court included a single paragraph relating to the issue of disclosure of contingent fees:

> Also, requirements relative to the content of the advertising concerning legal fees would be permissible under the United States Supreme Court rulings cited. Certainly for purposes of clarity to those reading a lawyer advertisement which refers to contingent fees, the requirement should be that such fees be specifically expressed, as well as any additional costs that might be assessed the client (App. 6a).

[17]It is more than a little ironic that the most controversial aspect of the ad in *Bates* was the inclusion of specific fee information and the phrase "very reasonable fees." *See* 433 U.S. at 386-87 (Burger, C.J., dissenting) and *id.* at 392-94 (Powell, J., dissenting). Yet here, where appellant avoided those potentially troubling statements, he finds himself accused of having put too little information in his ad about the rates that he charges.

Those two sentences do not, however, establish a substantial government interest of the kind required by *Central Hudson*. The first simply recognizes, as does appellant, that neither *Bates* nor *R.M.J.* absolutely prohibited states from regulating the contents of advertisements involving legal fees. The other seems to suggest that the relevant governmental interest is in preventing the public from being misled ("for purposes of clarity"), but that is by no means certain, although it is the position that appellee espoused in its opposition in this Court (Opp. 9-10).

There can be little doubt that preventing misleading advertisements is a substantial government interest, but Ohio must still establish, under *R.M.J.*, that the Dalkon shield ad is "inherently likely to deceive or [that] the record indicates that a particular form or method of advertising has in fact been deceptive." 455 U.S. at 202. If that cannot be shown, Ohio must establish that the disclosure requirement "directly advances the state interest involved" and that it could not be served as well by a "more limited restriction on commercial speech." *Central Hudson*, 447 U.S. at 564. Moreover, because Ohio has imposed a requirement of affirmative disclosure, it also must overcome another important aspect of *Central Hudson:* "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. *Bates v. State Bar of Arizona, supra* at 374." 447 U.S. at 562.

The principal difficulty in defending this requirement is that the Ohio Court failed to identify who is being misled and how. Nor could it sustain such a finding under the First

Amendment, since appellee offered no evidence to support the constitutionality of the Rule. *See Friedman v. Rogers,* 440 U.S. 1, 13-14 (1979)(ban on use of trade names for optometrists upheld because of prior history of abuses in the area).

It would be pure speculation to suggest that consumers generally do not appreciate the meaning of the term "contingent fee basis," or that they are ignorant of the difference between fees and costs. As this Court observed in *Bates,* the prohibition "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information." 433 U.S. at 374-75. Moreover, Ohio has not simply prohibited certain kinds of statements, but has mandated that every time a lawyer uses the words "contingent fee" in an advertisement, he must fully disclose his fee structure and state whether his rates are computed before or after costs are paid. These difficulties are particularly pertinent in determining whether Ohio's rule "directly advances" the asserted interest and whether it does so in a manner "not more extensive than necessary to serve that interest." *Central Hudson,* 447 U.S. at 556.

Other portions of the Ohio Code of Professional Responsibility also support the conclusion that the latter two standards in *Central Hudson* have not been met. The two subparts of DR 2-101(B) which follow subpart (15) on contingent fees [subparts (16) and (17)] permit a lawyer to advertise hourly rates and fixed fees for specific legal services (App. 28a). However, neither contains any requirement that such ads always include specific rates or total fees to be charged whenever the terms "hourly rates" or "fixed schedule of fees" are mentioned. Nor does either provision mandate the disclosure of costs, yet costs can surely be as important for fixed or hourly fee cases as they are in the contingent fee situation. The exclusion of such requirements under subparts 16 and 17, like the less than complete ban on illustrations, presents the same problems of under and overinclusion which caused the Court to find the rules at issue unconstitutional in

First National Bank of Boston v. Bellotti, supra, 435 U.S. at 793, and *Zablocki v. Redhail,* 434 U.S. 374, 390 (1978).[18]

There is another flaw in the mandatory disclosure requirement of DR 2-101(B)(15). As this Court observed in *Bates,* advertising does not "provide a complete foundation on which to select an attorney." 433 U.S. at 374. Thus, DR 2-101(B)(15) deals only with the contents of an advertisement and does not affirmatively require disclosures in any other situation. If Ohio were truly concerned with protecting clients from entering into contingent fee agreements without knowing precisely what rates applied, and whether the rates were computed before or after costs were deducted, and without assuring that the client knows that he or she is liable for costs even if the case is ultimately lost, it would require that *all* contingent fee agreements be in writing and contain such information. At the very least, it would require all attorneys, regardless of how a client came to their office, to provide such information before employment could be accepted.

But Ohio has no such rule. DR 2-106, which discusses fees, is the only arguably relevant section, and it says nothing whatsoever about any of these questions. Nor do the relevant Ethical Considerations (E.C. 2-19 and 2-20) provide any guidance other than a statement in E.C. 2-19 that fee agreements ought to be in writing. *Cf. Central Hudson,* 447 U.S. at 574-75 (Blackmun, J., concurring, on the ground that the state was trying to regulate by denying information, rather than controlling the undesirable conduct directly). By way of contrast, Rule 1.5(c) of the ABA's new Model Rules of Professional Conduct specifically requires that contingent fee agreements be in writing and that they "state the method by

---

[18]Mandatory disclosure also creates other problems. Many attorneys have no single rate applicable to all contingent fee cases, but may vary their charges depending on circumstances, including the likelihood of success, the amount of the potential recovery, and whether they include work done on appeal. Ohio's rule requiring disclosure of fee rates in every case would simply lead to uniformity, undoubtedly at the highest rather than the lowest level.

which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated" (Add. at l). Moreover, its new rules on advertising (specifically Rules 7.l and 7.2) contain no such mandatory disclosure of the kind found in Ohio's DR 2-l0l(B)(l5), and both of appellant's expert witnesses testified that they were unaware of any benefits from the "laundry list" approach adopted by Ohio, of which DR 2-101(B)(15) is one example (T. 110, 157-59).

The absence of mandatory disclosure requirements outside the rules on advertising, coupled with the failure of Ohio to require that contingent fee agreements contain such information, regardless of how the client learned of the lawyer's availability, demonstrate that there is no connection between the requirement of DR 2-l0l(B)(l5) and the goals that it purportedly seeks to achieve. The absence of such connection suggests that Ohio's affirmative disclosure requirements for advertisements for contingent fee cases are directed more at suppressing contingent fee ads than at preventing misleading information. This conclusion is reinforced by the fact that the requirements are likely to discourage lawyers from advertising which, in cases such as this, will mean fewer people will learn of their rights and will find a lawyer to vindicate them. *See Appert & Pyle,* 315 N..2d at 210 ("availability of contingent fee [for Dalkon Shield case] is an important consideration"). To the extent tht DR 2-l0l(B)(l5) may aid in reducing client deception, it is far broader than necessary, and its goals could be far better achieved by requiring that all fee agreements (or at least all contingent fee agreements) be in writing and include the information regarding rates and costs that Ohio now considers to be necessary for those who read advertisements for contingent fee cases. Because Ohio's rules on advertising in contingent fee cases, like those restrictions struck down in *R.M.J.,* are not closely tailored to the ends

they purport to advance, they cannot be sustained under the First Amendment.

* * *

While the justifications offered in support of Ohio's broad restrictions on lawyer advertising are plainly insubstantial, the very fact that this Court has before it for plenary consideration the fifth case in eight years involving lawyers who were disciplined for attempting to publicize the availability of their services points to the existence of a broader problem. Until this Court explicitly states that there is a heavy burden which must be met in order to sustain any restraint on non-misleading lawyer advertising, the Court will remain the final arbiter for a myriad of disputes like this one. Seven years after *Bates,* and nearly three years after *R.M.J.,* many states, including Ohio, continue to enforce highly restrictive provisions, such as the laundry list of permitted subjects contained in DR 2-l0l(B). Appellant submits that the time has come for this Court to make it clear that the sort of broad restrictions imposed by Ohio will not be countenanced and that the States have no choice but to revise their traditional rules so that regulation of lawyer advertising does not go beyond the narrow range permitted by the First Amendment.

II. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE CHANGED THE BASIS FOR OBJECTING TO HIS DRUNK DRIVING AD.

Counts II and III dealt with the drunk driving advertisement. Both proceeded on a common theory: the ad proposed a contingent fee in a criminal case, which is prohibited by DR 2-106(C). Since appellant did not enter into any such agreement, appellee acknowledged that he did not violate the substantive Rule. Appellee nonetheless argued that the ad was prohibited because it proposed an unlawful transaction, and hence the ad could be prohibited as deceptive under DR 2-l0l(A). In addition, appellee alleged that since the arrange-

ment was for a contingent fee, it was specifically forbidden by the introductory clause in DR 2-101(B)(15). These were the theories alleged in the complaint and amended complaint (J.A. 3-4, 22-23), and what appellee told the Panel had been proven at the hearing (T. 14, 43-44, 231-32). Appellant, on the other hand, argued that there was a significant difference between a contingent fee and the offer of a refund, and that his ad was not deceptive since he planned to make refunds if his defense was unsuccessful (T. 15-16, 26-27, 45, 237-38).

The difficulty for appellee is that neither the Board nor the Ohio Court accepted its theories. The Board found no violation of DR 2-106(C), and the Ohio Supreme Court did not even mention that provision. Instead, the Board based its ruling on an entirely new theory—that the ad was misleading because of what the Board said was the common practice of defendants pleading guilty to lesser included offenses when charged with drunk driving, a practice that was not proven by record evidence, but through judicial notice of unspecified court records. Under the Board's theory, a client who pled guilty to some lesser offense would not be convicted of drunken driving, no refund would be paid, and hence the public would have been misled by appellant's ad. However, the theory was never urged by appellee, but was invented by the Board after the trial, after all of the evidence was in, and after counsel had submitted their post-trial briefs. Indeed, in its brief to the Ohio Supreme Court, appellee recognized that this was a change in theory when it stated that it "certainly accepts the Board's findings" but then urged the Court to rule on the theory on which it had brought the charges and tried the case (Brief of Sept. 23, 1983 at 3-5).

Changing theories in midstream in lawyer disciplinary proceedings has been condemned by this Court in *In re Ruffalo,* 390 U.S. 544 (1968). There, this Court ruled that a lawyer is "entitled to procedural due process, which includes fair notice of the charge." *Id.* at 550. It went on to observe that the "charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the

accused." *Id.* at 551. The Court further noted that "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.* at 552.

A similar violation of due process was found in *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), where an appellate court had upheld a criminal conviction on the basis of a section of the law not charged, rather than the one on which the case was tried:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

As the Court stated, it is "as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *DeJonge v. Oregon,* 299 U.S. 353, 362 [1937]." *Id. See also Morgan v. United States,* 304 U.S. 1, 18 (1938) ("right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them"); and *Wolff v. McDonnell,* 418 U.S. 539, 564 (1974) ("Part of the function of the notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact"). And, as this Court recently observed in *Bowman Transportation Inc. v. Arkansas-Best Freight System Inc.,* 419 U.S. 281, 288 n.4 (1974):

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decisions so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Aside from the notice violation, due process was also offended because of the total absence of any evidence in the record to support the essential factual predicate relating to the practices at the Municipal Courts. *See Thompson v. Louisville*, 362 U.S. 199 (1960). Whether due process would allow the reports of the Municipal Courts, if indeed there are such documents showing a pattern of the kind asserted, to be received in evidence to prove the practice alleged would depend on whether there is sufficient assurance of their "underlying reliability and probative value." *Richardson v. Perales*, 402 U.S. 389, 402 (1971). But to take judicial notice of the contents of those reports, and to generalize about the practice in the Municipal Courts based on them, in order to make a determination of whether an ad is misleading, without giving appellant any opportunity to respond to the actual charge on which he was found guilty, is surely a violation of fundamental due process. *See Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").[19] *See also Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292 (1937) (agency reliance on judicial notice as a basis for proving essential facts held to violate due process). Moreover, the Ohio Supreme Court's casual acceptance of the Board's expansive use of judicial notice, especially in a First Amendment context, runs counter to this Court's requirement in *R.M.J.* that there be record support for a finding that an advertisement is misleading. *See* 455 U.S. at 202, 205-07.

Accordingly, either the absence of fair notice of the charges or the failure to offer evidence to support the claim that the drunk driving ad was misleading is sufficient to overturn the Ohio Supreme Court's ruling on Counts II and III. Taken together, they constitute a serious departure from the man-

[19] *But see Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

dates of the Due Process Clause and require a reversal of the reprimand based on the drunk driving ad.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ohio should be reversed, and the charges against the appellant dismissed.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

November 9, 1984

ADDENDUM
EXCERPTS FROM AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT ADOPTED AUGUST 2, 1983

RULE 1.5 Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

RULE 7.2 Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

RULE 7.3 Direct Contact with Prospective Clients

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

RULE 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in a patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and

(c) (provisions on designation of specialization of the particular state).

RULE 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.